93-606

No.

Supreme Court, U.S.
FILED
OCT 18 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

GREGORY C. KRUG,
Petitioner,
vs.
VALLEY FIDELITY BANK AND TRUST COMPANY, and ELEANOR BARRON KRUG,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

GREGORY C. KRUG

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QUESTIONS PRESENTED

1. If a court determines that a trustee was not negligent during a specific time frame, does the doctrine of Res Judicata prevent the beneficiaries from suing the trustee for negligent acts which were committed after the first trial was concluded?

2. Does the doctrine of Res Judicata apply when a negligent act, which did not occur until after the first trial concluded, subsequently becomes known?

3. Did the courts below err when each ignored legal principles established by the Tennessee Supreme Court?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, First Tennessee Bank National Association, into which Valley Fidelity Bank and Trust Company was merged after the commencement of this litigation, is also a real party in interest.

RULE 29.1 STATEMENT

First Tennessee Bank National Association is a wholly-owned subsidiary of First Tennessee National Corporation.

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

GREGORY C. KRUG,
Petitioner,
vs.
VALLEY FIDELITY BANK AND TRUST COMPANY, and ELEANOR BARRON KRUG,
Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review a judgment and order of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit issued its unpublished opinion on July 20, 1993. (Appendix A herein.) The trial court's order, reviewed on appeal, is unpublished, but it appears herein as Appendix B. Both courts' orders are available in LEXIS (8375 and 18800).

JURISDICTION

The Federal Courts have jurisdiction because the amount in controversy exceeds $50,000; the Petitioner is a citizen and resident of California, and both Respondents are citizens and residents of Tennessee. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) to review the final decision of the Sixth Circuit Court of Appeals.

STATEMENT OF THE CASE

On May 4, 1987, George C. Krug (George) formed the George Charles Krug Trust (the GCK Trust). George and his wife, Eleanor B. Krug (Eleanor), were the original co-trustees. Shortly after its formation, George transferred substantially all of his assets, including his personal residence (the Property), to the GCK Trust.

George died in July 7, 1988. Pursuant to the GCK Trust Agreement, the GCK Trust then became irrevocable and George's son, Petitioner Gregory C. Krug (Greg), succeeded George as a co-trustee of the GCK Trust.

In connection with his preparation of George's estate tax return, Greg asked a local realtor, John P. Carter (Carter), to determine the value of the Property. Carter informed Greg that the Property was worth $465,000 at George's death. Due to the availability of the marital deduction (26 U.S.C. §2056) no estate tax would have been payable, regardless of the Property's value. Accordingly, there was no reason for Greg to challenge the accuracy of Carter's appraisal.

Eleanor continued to reside in the Property through December 1989. In January 1990, she told Greg that she

wanted to move into another residence. In February 1990, in recognition of the fact that, once Eleanor no longer wanted to live there, the Property was not a suitable investment for the GCK Trust, (for reasons explained herein at footnote 1, page 4), Greg and Eleanor agreed, in writing, that Greg would buy the Property from the GCK Trust at its "fair appraisal." Neither Greg nor Eleanor had any reason to believe that the Property's value had changed since Carter's appraisal and hence they agreed that Greg would buy the Property for $465,000.

Greg then asked Sovran Bank (now Nations Bank) for a loan to purchase the Property. Sovran hired Kenneth Woodford (Woodford) to appraise the Property. Woodford appraised the Property at $275,000. Since neither Greg nor Eleanor believed that Woodford's appraisal was accurate, Greg asked Valley Fidelity Bank and Trust Company (Valley) to make this loan. Valley hired Hop Bailey (Bailey), an appraiser it frequently relied upon, to appraise the Property. Bailey appraised the Property at $275,000. Neither Woodford nor Bailey relied upon the same comparable properties in determining the Property's value. Greg did not have a pre-existing relationship with either Woodford or Bailey.

In May 1990, Greg offered to buy the Property for $275,000, its "fair appraisal," based upon the two MAI appraisals. Eleanor unrealistically demanded that Greg pay $375,000, despite their earlier written agreement that Greg would buy the Property at "fair appraisal." When Greg told Eleanor that the GCK Trust should list the Property for sale to resolve any doubt as to its value, Eleanor: (1) refused to list the Property at any price, (2) fired Greg as a co-trustee, and (3) appointed Valley in his stead.

On May 26, 1990, Valley and Eleanor (the Trustees) leased the Property (which they later testified was worth $465,000) for $1,500 a month, with the GCK Trust being responsible to pay all of the Property's expenses, other than the utilities.

On June 1, 1990, the Trustees filed suit against Greg in Knox County Chancery Court. Greg filed a cross-complaint for damages flowing from the Trustees' mismanagement of the GCK Trust's assets. He contended that by refusing to sell the Property to anyone for its "fair appraisal," the Trustees were improperly discriminating against him.[1]

In January 1991, the Trustees listed the Property for sale with Carter for $465,000.

The Chancery Court trial, (Decision No. 105013-2) was held in March 1991. In defense of Greg's counter claim, Valley's senior vice president, Robert Killefer (Killefer) unequivocally testified that the Property was then worth $465,000, despite his knowledge of the two MAI appraisals (one of which he ordered) which stated that the Property was only worth $275,000. In support of Greg's allegation that the Trustees had mismanaged the GCK Trust by not selling the Property to anyone, Greg testified that the GCK Trust's net income from the Property from June 1, 1990 to November 1, 1990 was only $586. His testimony was not contested.

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[1] Under the GCK Trust Agreement, Eleanor was entitled to receive distributions from the GCK Trust equal to the greater of: (a) her reasonable needs, or (b) the GCK Trust's income, other than capital gains; *i.e.*, if her reasonable needs exceeded the GCK Trust's noncapital gain income (which they did), Eleanor could (and did) invade corpus, which would otherwise inure to Greg in his capacity as a remainder beneficiary. Therefore, retaining the Property exhausted the GCK Trust's noncapital gain income, which permitted Eleanor to invade the GCK Trust corpus, to Greg's detriment.

Nevertheless, the Chancery Court did not find that the Trustees had been negligent in retaining the Property, at least from May 1990 through March 1991.

On August 5, 1991, Greg again offered to purchase the Property for $275,000.

On August 7, 1991, the Trustees sent a letter to Greg which provided that: ". . . your offer to purchase the property for $275,000, payable in cash at closing, is accepted."

On August 13, 1991, Greg sent a $5,000 check to the Trustees designated as a "good faith" deposit on the Property.

On August 16, 1991, the Trustees informed Greg that they were now unwilling to sell the Property to Greg.

On August 27, 1991, Greg filed suit against the Trustees for specific performance for the sale of the Property.

On December 9, 1991, Greg filed a Motion to Amend his Complaint (Appendix C) to charge the Trustees with negligence resulting from the $190,000 of economic depreciation (of the Property) which the GCK Trust sustained from March 1991 through December 1991.

On December 31, 1991 (nineteen months after Greg first offered to purchase the Property for $275,000), the Trustees finally sold it to him for exactly $275,000.

On January 27, 1992, the District Court refused to permit Greg to amend his complaint because:

> [T]he facts which support Plaintiff's present cause of action for negligence in this court are the same facts that supported his previous cause of action . . . in state court. [Appendix B, p. 5]

REASONS FOR GRANTING THE WRIT

It appears that neither of the courts below understood the factual basis for Greg's Complaint. While it is true that both Greg's Cross-complaint in the Chancery Court litigation and the instant matter arose from the Trustees' refusal to sell the Property (to anyone), the retention of the Property is the only fact which is common to the two matters. The Chancery Court Cross-complaint arose from the fact that the Trustees' refusal to sell the Property resulted in Eleanor invading the GCK Trust corpus, thereby depriving Greg of his inheritance. The instant matter involves the depreciation of the Property which occurred subsequent to the Chancery Court trial. While these causes of action may appear to be identical, they are totally unrelated. If the Property's net operating income had compared favorably to the rates then available on bonds, certificate of deposits, etcetera, then Greg's Chancery Court Cross-complaint would fail regardless of whether the Property depreciated. If the Property had not depreciated, then Greg's Complaint in the instant case would fail — regardless of the adequacy of the Property's net operating income. While the two causes of action may appear to be identical when viewed superficially, any real estate professional could easily distinguish the two matters.

There are three reasons why a Writ should issue: (1) the courts below ignored the doctrine of Judicial Estoppel; (2) the courts below applied the doctrine of Res Judicata in a manner which is inconsistent with the Supreme Courts of both Tennessee and New York; and (3) the Respondents should not be allowed to profit from Killefer's dishonest testimony.

Judicial Estoppel

In the Chancery Court litigation, Greg's counterclaim alleged that the Trustees had been negligent in not selling the Property in light of the uncontroverted fact that the Property only earned $586 during the five-month period which ended on October 31, 1990.[2] Recognizing Valley's culpability as to this allegation, Killefer did what is all too common in litigation — he lied! Notwithstanding the fact that the MAI appraiser Valley had hired to appraise the Property testified that it was only worth $275,000, Killefer testified, in open court, that the Property's value was $465,000.

The Chancery Court believed that Killefer was telling the truth and therefore determined that accepting Greg's $275,000 offer for a property which was worth $465,000 would be more negligent than retaining the Property, notwithstanding its meager net operating income. But shortly after the time had expired within which Greg could have made a Rule 60 Motion for a new trial with respect to the Chancery Court litigation, Valley agreed to sell the Property to Greg for $275,000. What a surprise!

Determining the value of real estate has always been an "educated guess." Had Killefer testified that the Property was worth $300,000, a subsequent determination that the Property was worth $275,000 would not have reflected adversely upon his previous testimony. But any real estate professional knows that it is impossible for anyone to *honestly* believe that the Property was worth 69% [($465,000 - $275,00) + $275,000] more than

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[2] If the Property was worth $275,000, then the GCK Trust's annual yield on this investment would have been 1/2% per annum ($586 + 5 x 12 + $275,00).

the value which was determined by two unrelated and disinterested MAI appraisers (one of which Valley hired). Since Killefer's testimony was clearly dishonest, there is no explanation for that testimony, other than it was falsely offered solely to defend Valley from the negligence alleged in Greg's cross-complaint.

When applied to the instant facts, the doctrine of Judicial Estoppel establishes that the Property was worth $465,000 in March 1991, at least for the purpose of this litigation, since it involves the same parties as in the Chancery Court litigation. It therefore follows that, unless Valley argues that it sold the Property in December 1991 for $190,000 less than its fair market value (thereby exposing it to a new and different cause of action), the Property must have depreciated by $190,000 from March 1991 to December 1991. The only question with which the courts below should have been concerned was whether Valley was negligent by not selling the Property prior to the depreciation thereof. Since the words "judicial estoppel" do not appear in either Courts' Opinion, it appears that both courts ignored this vital doctrine.

Res Judicata

The District Court refused to permit Greg to amend his complaint (to add the negligence claim) under the doctrine of Res Judicata. That decision is clearly erroneous, for three reasons:

(1) The courts below apparently believe that since the Chancery Court determined that Valley's misconduct as Trustee *up to the Chancery Court trial* did not rise to the level of negligence, Valley is forever immune from a charge of negligence. The Tennessee State Courts see the world quite differently. In *Henegar v. International*

Minerals & Chemical Corp. (1962) 209 Tenn. 355 at 356, 354 S.W.2d 69, the Tennessee Supreme Court held that:

> [T]he plaintiff must recover for all damages sustained until the filing of the suit. He may maintain successive actions *for future damages*. . . . [Emphasis added.]

That court cited *Nashville v. Comar* (1890) 88 Tenn. 415, 12 S.W. 1027 at 1030, which held that:

> It seems to us that the true rule deducible from the authorities is that the *law will not presume the continuance of a wrong*, nor allow a license to continue a wrong, when the cause of the injury of such a nature as to be abatable, either by the expenditure of labor or money. And that where the cause of the injury is one not presumed to continue, that the damages recoverable from the wrong-doer are only such as have accrued before the action brought, *and that successive actions may be bought for the subsequent continuance of the wrong* or nuisance. [Emphasis added.]

If this matter was before the Tennessee Supreme Court, it would undoubtedly rule that Res Judicata does not apply with respect to Valley's performance after the Chancery Court trial. The courts below clearly erred when each ignored this legal principle.

(2) In the Chancery Court litigation, the court dismissed Greg's counter-claim of negligence against Valley because it believed that Valley's numerous

failures as a co-trustee were largely attributable to the fact that Valley did not know whether it was, in fact, a co-trustee. It believed that Valley was reluctant to take any irrevocable action until its appointment was confirmed by the court. However, in regard to the sale of the Property, the Chancery Court ruled that Greg's claim was prematurely brought:

> The sale of the residence, with its ramifications, is a business decision to be made by the Trustees. The Court ought not to intrude *at this time*. It is to be presumed that the Trustees will perform their duties and function consistently with legal and trust requirements. [¶VI Chancery Court Opinion]
>
> Leave the trust business to the trustor [sic] *until it becomes a controversy that is justiciable* . . . the trustee, of course, obviously has a duty to proceed with reasonable diligence and reasonable haste to dispose of this Q-tip asset. . . . And obviously, if the property is worth somewhere between the low and the high range that we've heard, the proceeds from the sale will generate more income than that [the net rental income]. So it's a matter of common sense for the trustees to function fast. And if they don't, given what we've heard, *then there would be a judicial controversy for the Court to function*. . . . [Emphasis added.] [Chancery Court's Excerpted Transcript, p. 17-18, March 21, 1991]

In *Spector v. National Cellulose Corp., et al.* (1943) 181 Misc. 465 at 466, 48 NYS 2d 234, the New York Supreme Court ruled that an action which was dismissed because it was premature can never form the basis of Res Judicata:

> It seems to me entirely plain that a judgment dismissing an action as prematurely brought cannot possibly support a plea of res judicata in a second action subsequently *brought upon other and additional allegations* . . . . [Emphasis added.]

The decision of the courts below is diametrically opposed to this New York Supreme Court decision.

(3) According to the Tennessee Supreme Court in *State ex rel. v. West* (1918) 139 Tenn. 522 at 529, 201 SW 743 at 745 Ann. Cass. 1918 D. 749, for the doctrine of Res Judicata to apply, the same evidence must have been available in both trials:

> It is said the best test as to whether a former judgment is a bar in subsequent proceedings is to consider whether the *same evidence* would sustain both . . . .

Even the district Court understood that the depreciation occurred after the Chancery Court trial concluded.

> [P]laintiff's complaint is based in part on events transpiring subsequent to the state court litigation. . . . [Appendix B, p. 7]

Since the depreciation occurred after the conclusion of the Chancery Court litigation, the evidence which would have supported that argument was not available during that litigation. It therefore follows that the doctrne of

Res Judicata cannot be properly applied to the instant litigation.

CONCLUSION

The final reasons why a Writ should issue are to:

(1) Prevent Valley from profiting from Killefer's dishonest testimony. There can be no doubt that Killefer lied during the Chancery Court litigation to defend Valley from being held guilty of negligence. And now, having previously escaped an adverse judgment by offering dishonest testimony, the courts below have again saved Valley from an adverse judgment by ignoring the doctrine of Judicial Estoppel and incorrectly applying the doctrine of Res Judicata. If a Writ is not issued, then Valley will forever benefit from Killefer's dishonest testimony.

(2) If this Court does not issue a Writ, then Valley's successor (First Tennessee Bank) will be free to mismanage the GCK Trust for the duration of its term, knowing full well that it is forever immune from a charge of negligence, thanks to the Sixth Circuit's erroneous interpretation of the doctrine of Res Judicata.

Petitioner prays that Certiorari be granted.

Dated: October 15, 1993.

Respectfully submitted,

GREGORY C. KRUG
Pro se

APPENDIX A

NOT FOR PUBLICATION
NO. 92-5612
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
JUL 20 1993
LEONARD GREEN, Clerk

GREGORY C. KRUG, Individually and as a Beneficiary of the ELEANOR BARRON KRUG Q-TIP TRUST,
Plaintiff/Appellant,
v.
VALLEY FIDELITY BANK AND TRUST COMPANY, a Tennessee Corporation; ELEANOR BARRON KRUG, a Tennessee Resident, as Co-Trustees of the GEORGE CHARLES KRUG TRUST,
Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be *prominently* displayed if this decision is reproduced.

BEFORE: GUY and BOGGS, Circuit Judges; and BELL, District Judge.*

PER CURIAM. This *pro se* appeal focuses on a dispute arising from a sale of a piece of real estate in Tennessee. After careful consideration, we have decided that there is no need for oral argument in this case and exercise our authority to waive oral argument, pursuant to Rule 9(a). Rules of the Sixth Circuit. We AFFIRM the rulings of the district court.

I.

In early 1990, Eleanor Barron Krug ("Eleanor") and Gregory C. Krug ("Gregory"), mother and son, respectively, were co-trustees of the George C. Krug Trust (the "Trust"). One of the assets of the Trust was a parcel of real property (a residence) located at 235 Jones Bend Road in Louisville, Tennessee (the "Jones Bend Property" or "Property").

In February 1990, Gregory wanted to buy the Property from the Trust. Eleanor, on behalf of the Trust, offered to sell the Property at "fair appraisal." Based on an appraisal done in July 1988, Gregory and Eleanor believed that the Property was worth $465,000.

While attempting to secure financing for the purchase, however, Gregory learned from his appraiser that the Jones Bend Property was then worth no more than $275,000. Another appraiser, hired by Eleanor's bank, Valley Fidelity Bank and Trust Company ("Valley"), confirmed the $275,000 valuation.

* The Honorable Robert Holmes Bell, United States District Judge for the Western District of Michigan, sitting by designation.

Gregory accordingly offered $275,000 for the Property in May 1990. Eleanor rejected the offer, requesting $375,000. She also took several actions, including removing Gregory as a co-trustee of the Trust and appointing Valley in his place.

Valley and Eleanor then instituted in June 1990 a lawsuit against Gregory and other entities in the Chancery Court in Knox County, Tennessee. They sought to validate their actions, particularly the removal of Gregory as a co-trustee. Gregory, in turn, filed a counterclaim against them, alleging, among other things, that Eleanor had violated her fiduciary duties and caused damage to the Trust by refusing to sell the Jones Bend Property.

The Knox County lawsuit ended favorably for Valley and Eleanor. After trial, the Chancellor of the Knox County Chancery Court found merit in most of Valley and Eleanor's claims in the complaint and dismissed all of Gregory's claims in the counterclaim. In particular, the Chancellor concluded that Gregory had failed to prove the allegations that Valley and Eleanor had violated their fiduciary duties in retaining the Jones Bend Property as a trust asset. The Chancellor entered a judgment in favor of Valley and Eleanor on May 5, 1991.

In July 1991, Gregory again thought about purchasing the Jones Bend Property. He approached Valley and Eleanor regarding the sale of the Property, which by then had been listed for sale with a realtor.

Several letters about the terms of the sale were then exchanged between Gregory and Valley and Eleanor. Gregory thought that a contract had thus formed; he sent a $5,000 check as a "good faith" deposit. Valley and Eleanor did not think so, however, rejecting the check and calling off the deal at that time.

On August 27, 1991, this diversity lawsuit ensued. Gregory alleged in his complaint that through the exchange of letters, a valid contract had formed between the parties, requiring specific performance and payment of all selling expenses and closing fees by the Trust.

Valley and Eleanor then filed a "motion to dismiss and for sanctions." After oral argument, when it became known that the parties were contemplating on consummating the sale of the Jones Bend Property, the district court established a trial date on the question of allocating selling expenses and closing costs only. No order followed immediately.

Subsequently, while the "motion to dismiss and for sanctions" was pending, Gregory filed a motion to amend under Fed. R. Civ. P. 15. In the proposed amended complaint, he added a state-law negligence claim against Valley, alleging that because of Valley and Eleanor's "negligent handling of the trust residence [the Jones Bend Property]," J.A. at 19, the value of a trust asset (the Property) was not maximized, causing loss to the Trust. The amended complaint specifically mentioned that Valley and Eleanor had been negligent in refusing to sell the Property to Gregory in May 1990. The amended complaint further stated that "specific performance issues" in the initial complaint have "already been decided" by the court. J.A. at 16.

On January 27, 1992, the district court issued a memorandum opinion addressing both motions. The court first suggested that since the parties had consummated the sale of the Jones Bend Property on December 31, 1991, the primary issues in the original complaint concerning specific performance of the real estate contract for the Property were effectively moot. The district court then observed that since the "plaintiff's remaining claims in the original complaint ... are completely subsumed in his proposed amended

complaint," J.A. at 22, it would only address the amended complaint.

In so doing, the district court ruled that since the negligence claim contained in the proposed amendment had been or could have been raised in the prior Knox County litigation, the claim was barred by the doctrine of res judicata under Tennessee law. The court also denied sanctions against Gregory.

About two months later, the district court issued a memorandum opinion on the question of allocating selling expenses and closing costs. After conducting a "paper trial," reviewing the written submissions only, the court concluded that the Trust was not required to pay all of selling expenses and closing costs. The court found that the exchange of letters had created no contract between the parties regarding selling expenses and closing costs. The district court reasoned that the parties had violated Tennessee's version of the "mirror image rule," requiring an effective acceptance to be identical to the offer and unconditional. The court pointed out that Valley and Eleanor's acceptance was conditional on closing occurring within a certain time limit.

Finding no binding contract between the parties, the district court then allocated selling expenses and closing costs under the prevailing Knoxville, Tennessee custom and practice. Gregory was ordered to pay his share, $3,320.54, to the Trust.

Gregory appeals from both rulings of the district court.

II.

Gregory challenges the district court's rulings as follows: first, he argues that his motion to amend should have been granted because the doctrine of res judicata

did not bar the negligence claim in the proposed amended complaint; and second, he contends that the court's order requiring him to pay a part of the selling expenses and closing costs ($3,320.54) incurred in connection with the sale of the Jones Bend Property to the Trust pursuant to the Knoxville, Tennessee custom and practice was erroneous because a binding contract governing the allocation of selling expenses and closing costs was in effect. We are persuaded by neither argument.

A.

First, we think that the district court correctly denied Gregory's motion to amend the complaint under Rule 15(a). The proposed amendment, which was effectively the only pleading in this case to consider after the resolution of the specific performance issues in the original complaint and after the setting of a trial date for the allocation of selling expenses and closing costs, could not withstand a motion to dismiss. *See Hoover v. Langston Equipment Associates, Inc.*, 958 F.2d 742, 745-46 (6th Cir. 1992).

Under Tennessee law, which governs this diversity case, Gregory's negligence allegations contained in the amended complaint are barred by the doctrine of res judicata. As we stated in *Whitfield v. City of Knoxville*, 756 F.2d 455 (6th Cir. 1985),

> [t]he Tennessee courts have held that if a second lawsuit involving the same parties acting in the same capacities and touches the same subject matter as the first lawsuit, then the principles of res judicata apply.

Id. at 459. And we noted there that the scope of res judicata is wide: it bars consideration of all claims that were or reasonably could have been litigated by a party in the prior court action. *Id.*

This case falls well within that broad confine. Gregory's negligence allegations in the proposed amended complaint regarding Valley and Eleanor's mishandling of a trust asset — the Jones Bend Property — are essentially the same as the rejected "breach of fiduciary duty" allegations against Valley and Eleanor with respect to the Property in Gregory's counterclaim in the Knox County lawsuit. In both cases, Gregory, as a former co-trustee and a beneficiary of the Trust, claimed that Eleanor and Valley, the co-trustees, caused loss to the Trust by refusing to sell the Jones Bend Property to him in May 1990. Indeed, to the extent that there is any real difference between the present negligence claim and the prior breach of fiduciary duty claims regarding the failure to sell the Property, it appears that the difference is nothing more than a mere cosmetic changing of the labels for the claims.

Further, we cannot accept Gregory's argument that he could not have brought the current negligence claim in the amended complaint any earlier. According to Gregory, he could not have alleged this negligence claim in the Knox County litigation because Valley and Eleanor had not acknowledged the depreciation of the Jones Bend Property until sometime after the conclusion of that litigation. Contrary to his assertion, however, it appears that Gregory had the central factual bases to make the same claim — indeed, did make such a claim in the Knox County litigation — after learning of the substantial disparity between the valuation results of the 1988 and 1990 appraisals of the Property. The fact that Gregory did not obtain Valley and Eleanor's purported admission — the last piece of fact further supporting

Gregory's depreciation argument — until after the conclusion of the Knox County litigation is not sufficient to allow him to avoid the broad reach of the doctrine of res judicata under Tennessee law.

B.

Second, we also believe that the district court correctly determined that no contract had formed regarding "selling expenses and closing costs." A review of the letters exchanged between the parties appears to indicate so.

Under common law, "a purported acceptance which adds qualifications or conditions operates as a counter-offer and thereby a rejection of the offer. This is so even if the qualification or condition relates to a trivial matter." John D. Calamari & Joseph M. Perillo, *The Law of Contracts*, § 2-21(a) at 101-02 (3d ed. 1987). This rule has been referred to as a "mirror image rule." *Id.* at 102.

Tennessee follows the "mirror image rule" closely. "An acceptance, to be effectual, must be identical with the offer and unconditional." *Canton Cotton Mills v. Bowman Overall Co.*, 149 Tenn. 18, 31, 257 S.W. 398, 402 (1924). Accordingly,

> a proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation unless the party who made the original offer renews it, or assents to the modifications suggested.

Id.

In this case, Valley's acceptance letter dated August 7, 1991, which contained the terms regarding the payment of selling expenses and closing costs, was not unconditional, or identical to, Gregory's offer letter dated August 5, 1991. Among other things, Valley's letter requested that "closing of the sale be held within sixty (60) days of [Gregory's] receipt of this acceptance, or at such earlier date as we may mutually agree." J.A. at 11. Moreover, Gregory did not subsequently accept Valley's counter-offer by writing or conduct. Notwithstanding the dispatch (and rejection) of Gregory's "good-faith" deposit, there was uncontradicted evidence indicating that there was no "meeting of the minds" regarding the question of when closing would take place, in light of the unresolved issues of the amount of down payment and the payment of selling expenses and closing costs. *See* Supplement to J.A. 5-8. To be sure, no closing took place within the time allotted in Valley's August 7, 1991 letter. Accordingly, we agree with the district court that no contract governing the allotment of selling expenses and closing costs existed in this case under Tennessee law.

III.

For the reasons stated above, the rulings of the district court are hereby AFFIRMED, pursuant to Rule 9(b)(3), Rules of the 6th Circuit.

ISSUED AS MANDATE: 8/12/93
COSTS: No Costs
FILING FEE . . . . $
PRINTING . . . . . $
TOTAL . . . . . $

A TRUE COPY
Attest:
LEONARD GREEN, Clerk
By /s/ Diane Schaur
Deputy Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
TENNESSEE AT KNOXVILLE

FILED
JAN 27 1 05 PM '92
U.S. DISTRICT COURT
EASTERN DIST. TENN.
BY /s/ RC Dep. Clerk

GREGORY C. KRUG, Individually
and as a Beneficiary of the ELEANOR
BARRON KRUG Q-TIP TRUST,
Plaintiff

v.

VALLEY FIDELITY BANK AND
TRUST COMPANY, ELEANOR
BARRON KRUG, as Co-Trustees of the
GEORGE CHARLES KRUG TRUST,
Defendants

CIV. 3-91-0501

ORDER

For the reasons set forth in the Memorandum Opinion this day passed to the Clerk for filing, it is hereby ORDERED as follows:

1. Defendants' motion to dismiss and for sanctions [Doc. 5] is GRANTED IN PART and DENIED IN PART whereby the court DISMISSES this action but will not impose sanctions against plaintiff for the filing of this lawsuit;

2. Plaintiff's motion to amend complaint [Doc. 13] is DENIED; and

3. The Clerk is DIRECTED to keep this case on the active docket until after the court enters its findings of fact and conclusions of law following the hearing on January 31, 1992.

ENTER:

/s/ James H. Jarvis
James H. Jarvis
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
TENNESSEE AT KNOXVILLE

FILED
JAN 27 1 05 PM '92
U.S. DISTRICT COURT
EASTERN DIST. TENN.
BY /s/ RC Dep. Clerk

GREGORY C. KRUG, Individually
and as Beneficiary of the ELEANOR
BARRON KRUG Q-TIP TRUST,
Plaintiff,

v.

VALLEY FIDELITY BANK AND
TRUST COMPANY and ELEANOR
BARRON KRUG, as Co-Trustees of the
GEORGE CHARLES KRUG TRUST,
Defendants.

Civ. 3-91-0501

MEMORANDUM OPINION

Plaintiff originally brought this diversity action to specifically enforce an agreement to sell a parcel of real property located at 4138 Wrights Ferry Road in Louisville, Tennessee (the "Jones Bend Property"). Plaintiff alleges that he offered defendants $275,000.00 for this property; that this offer was accepted; and that defendants reneged on their agreement to sell him the property. Therefore, plaintiff requests that the court order the defendants to issue a warranty deed to the

Jones Bend Property to plaintiff or his assignee in exchange for $275,000.00. Plaintiff also contends that the parties agreed that the closing costs for this transaction would be paid by the George Charles Krug Trust (the "Trust"),[1] owner of the real property, and that defendants are also liable for this amount. This matter is presently before the court on defendants' motion to dismiss and for sanctions [Doc. 5] and on plaintiff's motion to amend complaint [Doc. 13]. The issues raised in these motions have now been fully briefed by the parties [*see* Docs. 5A, 8, 9, 12, 14 and 15]. For the reasons that follow, defendants' motion to dismiss will be granted, and plaintiff's motion to amend will be denied.

At the outset, it must be noted that the parties have advised the court that they have settled the primary issue in this litigation relating to the sale of the Jones Bend Property. Specifically, the court has been advised that plaintiff has now purchased the Jones Bend Property from defendants and that the only issue remaining in that facet of this lawsuit relates to payment of the closing costs. That issue will be tried on January 31, 1992.[2]

It will not be necessary to discuss plaintiff's remaining claims in the original complaint since they are completely subsumed in his proposed amended complaint [*see* Doc. 13, attachment]. The gist of plaintiff's most recent allegations is that defendants were negligent because they maintained, prior to August of 1991, that the value of the Jones Bend property was between $375,000.00 to $465,000.00 when, in fact, the value of the property was $275,000.00, the amount of plaintiff's offer to defendants on May 14, 1990. Therefore,

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[1] The defendants, Valley Fidelity Bank and Trust Company and Eleanor Barron Krug, are co-trustees of the Trust.

[2] *See* Doc. 11.

plaintiff contends that if defendants had sold the property to him for $275,000.00 on May 14, 1990, then the Trust would have earned considerably more income during the last year and a half while defendants were attempting to sell it at an "unreasonable and inflated" price. Because defendants subsequently offered to sell the Jones Bend Property to him for $275,000.00 in August of 1991, plaintiff alleges that defendants were either negligent by allowing the Trust property to depreciate in value by $100,000 to $190,000 or negligent in refusing to sell the property to plaintiff in May, 1990 by attempting to sell it at "an unreasonable and inflated value." [*See id.*, p.3]. Thus, plaintiff alleges that defendants' negligence proximately caused damage to the Trust assets and to plaintiff's beneficial interest.

In their motion to dismiss and in their reply to plaintiff's motion to amend, defendants contend that plaintiff's cause of action for negligence is barred by the doctrine of *res judicata*. In particular, defendants maintain that this same issue was litigated in the Chancery Court for Knox County, Tennessee, Case No. 105013-2, on March 20, and 21, 1991. Defendants specifically rely on language set forth in the "third cause of action for breach of fiduciary duty and for injunctive relief" in Mr. Krug's counterclaim filed in the chancery court litigation. In that prong of his counterclaim, Mr. Krug alleges that defendant Eleanor Barron Krug "breached her fiduciary duties and caused damage to the Trust and [the plaintiff]" based, *inter alia*, on "loss of Trust income attributable to the refusal to sell the Jones Bend Property. . . ." [*See* Doc. 10, Exh. B, "Answer to Complaint and Counter Claims," p.18, ¶19]. In ruling on the issues raised in Mr. Krug's counterclaim, The Honorable William H. Inman, Chancellor by Designation, held, *nunc pro tunc* May 5, 1991, as follows:

> 6. The Defendant failed to prove the allegations of the Second, Third and Fourth Causes of Action of his Counterclaim. Neither Mrs. Krug nor Valley Fidelity Bank and Trust Company violated their fiduciary duties as Co-Trustees of the Krug Trust. Therefore, the Second, Third and Fourth Causes of Action of the Defendants, Mr. Krug's Counterclaim, are dismissed, with prejudice.

[*See* Doc. 10, Exh. A, Judgment, p.2].

Plaintiff attempts to circumvent the impact of this facet of the judgment in a two-fold manner. First, plaintiff couches the proposed amended complaint in terms of negligence as opposed to breach of fiduciary duty. Secondly, plaintiff focuses on the events which have transpired subsequent to the entry of the chancery court judgment. Neither position has merit.

The Tennessee courts have held that if a second lawsuit involves the same parties acting in the same capacities and touches the same subject matter as the first lawsuit, then the principles of *res judicata* apply. *Whitfield v. City of Knoxville*, 756 F.2d 455, 459 (6th Cir. 1985). Furthermore, *res judicata* bars litigation in a second suit of claims that were unsuccessfully raised or that should have been raised, but were not, in the prior suit. *Qualicare-Walsh, Inc. v. Ward*, 947 F.2d 823, 826 (6th Cir. 1991) (citing *Whitfield* at 459 n.5). A comparison of the two lawsuits reveals the same parties acting in the same capacities. Furthermore, the facts which support plaintiff's present cause of action for negligence in this court are the same facts which supported his previous cause of action for breach of fiduciary duty in state court. The facts relate to defendants' refusal to sell the Jones Bend property to plaintiff in May of 1990.

This second lawsuit not only "touches the same subject matter as the first lawsuit" — it is the same lawsuit. Plaintiff's claims of negligence are no more than a thinly veiled description of his claims for breach of fiduciary duties, which claims were fully litigated in state court.

Assuming *arguendo*, that plaintiff's claims of negligence raise an additional cause of action against these defendants, then the court further concludes that these claims *reasonably could have been litigated* by plaintiff in the state court action because, again, these claims relate to defendants' refusal to sell the Jones Bend property to plaintiff in May of 1990. *See Whitfield*, 756 F.2d at 459 (emphasis in original). Thus, plaintiff's claims of negligence in the proposed amended complaint are not sufficient to overcome principles of *res judicata*.

Finally, plaintiff claims that his motion to amend should be granted because of facts which have transpired subsequent to the conclusion of the state court litigation. This argument is unavailing. In essence, plaintiff claims that because defendants have now offered to sell him the property at $275,000.00 since they have been unable to sell it to any other purchaser for their previous asking price of $375,000.00 to $465,000.00, then this admission by defendants provides the basis for a separate cause of action. The court disagrees. At most, it might provide a basis for a Rule 60 motion under the Tennessee Rules of Civil Procedure in the chancery court, but it certainly provides the plaintiff no basis for relief in this court. Plaintiff cannot attack a valid state court judgment in this court by raising facts which have their genesis at a point in time prior to the state court litigation and which specifically touch upon the same subject matter litigated in state court. *See Whitfield*, 756 F.2d at 459. However, because plaintiff's complaint is based in part on events transpiring subsequent to the state court litigation, the

court will not impose any sanctions on plaintiff for filing the instant complaint.

Order accordingly.

/s/ James H. Jarvis
James H. Jarvis
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

FILED
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U.S. DISTRICT COURT
EASTERN DIST. TENN.
BY _____ Dep. Clerk

GREGORY C. KRUG, Individually
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Plaintiff,

vs.

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TRUST COMPANY, a Tennessee Corporation,
and ELEANOR BARRON KRUG, a
Tennessee Resident, as Co-Trustees of
the GEORGE CHARLES KRUG TRUST,
Defendant.

No. 3-91-501

MOTION TO AMEND COMPLAINT

Now comes Plaintiff, Gregory C. Krug, pursuant to Federal Rule of Civil Procedure 15 and moves this Honorable Court for permission to amend the Complaint.

Plaintiff would not add any additional cause of action nor additional Defendants, but only seek to more clearly set out the pendent claims in the original Complaint filed herein.

Wherefore, Plaintiff respectfully moves this Honorable Court for permission to file the attached amended Complaint.

Respectfully Submitted,

/s/ A. Philip Lomonaco
A. PHILIP LOMONACO

CERTIFICATE OF SERVICE

I do hereby certify that a true and exact copy of the foregoing MOTION TO AMEND has been served upon Attorney Paul T. Coleman, Heiskell, Donelson, Bearman, Adams, Williams & Kirsch, Suite 600, Plaza Tower, 800 Gay Street, Knoxville, Tennessee 37929 and William C. Wilson, Ambrose, Wilson, Grimm & Durand, P. O. Box 2466, Knoxville, Tennessee 37901, by placing same in the U.S. Mail, with sufficient postage thereon to carry same to its destination.

This 9th day of Dec, 1991.

/s/ A. Philip Lomonaco
A. PHILIP LOMONACO

IN THE UNITED STATES DISTRICT COURT
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Defendant.

No. 3-91-501

AMENDED COMPLAINT

Plaintiff would reallege Paragraphs One through Eight in the original Complaint. The remaining paragraphs in the original complaint are in reference to specific performance issues and have already been decided by this Honorable Court.

1. Prior to August of 1991, the Defendants maintained that the value of the Trust real estate was Three Hundred Seventy-Five Thousand Dollars ($375,000.00) to Four Hundred Sixty-Five Thousand Dollars ($465,000.00).

2. The Defendants, as Trustees, were negligent in dealing with trust property and should have known of the proper and realistic value of the property no later than May 4, 1990.

3. On May 4, 1990, Hop Bailey Company appraised the property at Two Hundred Seventy-Five Thousand Dollars ($275,000.00). Kenneth Woodford & Associates had previously appraised the property at Two Hundred Seventy-Five Thousand Dollars ($275,000.00) on approximately April 15, 1990.

4. The appraisals were made known to Valley's then attorney, William C. Wilson, who acutally [*sic*] requested the Hop Baily appraisal.

5. Had the Defendant sold the property at a non-negligent realistic price of Two Hundred Seventy-Five Thousand Dollars ($275,000.00) when the Plaintiff offered to purchase the property on May 14, 1990, the trust would have earned considerably more income. Valley Bank, through Robert Killefer, has previously stated under oath that the trust would have earned more income had the property been sold and the proceeds placed in the Q-Tip trust.

6. Defendants negligently withheld selling the property, insisting on a sales price of Four Hundred Sixty-Five Thousand Dollars ($465,000.00), their only authority being an appraisal letter from a realtor by the name of John P. Carter, Jr.

7. At a Knox County Chancery Court trial on March 20-21, 1991, the Defendants maintained that the value of the property was Four Hundred Sixty-Five Thousand Dollars ($465,000.00).

8. As a counter-complaint against the Defendants in the Chancery Court proceeding, the Plaintiff herein claimed that the Defendants had breached their fiduciary duties to the trust beneficiaries by not making the real estate income-producing.

9. The Chancellor reached no conclusion about the value of the residence and basically reached no conclusion in his Judgment about what was to be done with the

real estate although, he did hold that Valley and Mrs. Krug had not breached their fiduciary duties.

10. Approximately five (5) months after the Chancery Court trial, the Defendants changed their position about the value of the residence by offering to sell it to the Plaintiff at Two Hundred Seventy-Five Thousand Dollars ($275,000.00).

11. Trustees are prohibited from selling trust assets for less than actual value and hence their offer to sell the residence for Two Hundred Seventy-Five Thousand Dollars ($275,000.00) is an admission that the residence is now only worth Two Hundred Seventy-Five Thousand Dollars ($275,000.00) and not Three Hundred Seventy-Five Thousand Dollars ($375,000.00) to Four Hundred Sixty-Five Thousand Dollars ($465,000.00) as the Defendants previously maintained.

12. The Defendants have either been negligent by allowing the trust property to depreciate in value by One Hundred ($100,000.00) to One Hundred Ninety Thousand Dollars ($190,000.00) or, they have been negligent in refusing to sell the property to the Plaintiff in May of 1990 by holding it out for sale at an unreasonable and inflated value. Either way, the Defendants have been negligent and have caused damage to the trust assets and the Plaintiff's beneficial interest.

13. Had the Defendants sold the property to the Plaintiff for Two Hundred Seventy-Five Thousand Dollars ($275,000.00) in May of 1990, the trust would have gained substantially more investment income.

14. Although the Plaintiff has only a remainderman interest in the Q-Tip Trust, he has standing to bring this action because the Defendants' negligence has caused an unauthorized distribution of trust corpus exceeding the income generated by the Q-Tip Trust assets.

Wherefore, Plaintiff, as beneficiary of the EBK Q-Tip Trust, demands a judgment against Valley Bank as Trustee, for the loss occasioned by the trust due to Valley's negligent handling of the trust residence.

Plaintiff makes no demand against Mrs. Krug, even though she acted as a Trustee because she was basically following the direction of her attorneys and the corporate trustee, Valley Bank.

Plaintiff also requests that Valley reimburse the trust in the amount of the loss and for the Plaintiff's legal fees and the trustee's legal fees associated with Valley's negligent conduct.

Plaintiff further asks for such other relief to which he may be entitled.

Respectfully Submitted,

/s/ A. Philip Lomonaco
A. PHILIP LOMONACO
Attorney for Gregory C. Krug

CERTIFICATE OF SERVICE

I do hereby certify that a true and exact copy of the foregoing AMENDED COMPLAINT has been served upon Attorney Paul T. Coleman, Heiskell, Donelson, Bearman, Adams, Williams & Kirsch, Suite 600, Plaza Tower, 800 Gay Street, Knoxville, Tennessee 37929 and William C. Wilson, Ambrose, Wilson, Grimm & Durand, P. O. Box 2466, Knoxville, Tennessee 37901, by placing same in the U.S. Mail, with sufficient postage thereon to carry same to its destination.

This 9th day of Dec, 1991.

/s/ A. Philip Lomonaco
A. PHILIP LOMONACO